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No. 77-1411

In the Supreme Court of the United States

OCTOBER TERM, 1977

REV. JOHN J. CAULFIELD, PASTOR, ST. ATHANASIUS CHURCH, ET AL., PETITIONERS

v.

PETER W. HIRSCH, REGIONAL DIRECTOR FOR THE FOURTH REGION, NATIONAL LABOR RELATIONS BOARD

AND

ASSOCIATION OF CATHOLIC TEACHERS, LOCAL 1776, AFT, AFL-CIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

RICHARD B. BADER,
CAROL A. DE DEO,
Attorneys,
National Labor Relations Board,
Washington, D.C. 20570.

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OPINION BELOW

The opinion of the district court (Pet. App. A1-A41) is not yet officially reported.

JURISDICTION

The judgment of the district court was entered on July 7, 1977. Appeals by respondents Hirsch and Association of Catholic Teachers, Local 1776, were docketed in the court of appeals on July 27, 1977 (No. 77-1972), and

August 5, 1977 (No. 77-2021). The petition for a writ of certiorari before judgment was filed on April 4, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a district court may enjoin National Labor Relations Board representation proceedings, where the procedures established by the National Labor Relations Act provide an adequate method for review of petitioners' contentions and those procedures have not been exhausted.

STATEMENT

On January 16, 1976, Local Union No. 1776, Association of Catholic Teachers, American Federation of Teachers, AFL-CIO (the Union), filed a petition with the National Labor Relations Board seeking a representation election in a unit of lay teachers employed at the parish elementary schools within the Archdiocese of Philadelphia.[1] Petitioners, pastors of five of the parishes that operate elementary schools, responded by filing this action in the United States District Court for the Eastern District of Pennsylvania, seeking to enjoin the Board's Regional Director from proceeding with the Union's representation petition on the ground that the application of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), to the parish schools violated the Free Exercise and Establishment Clauses of the First Amendment. The district court stayed the proceedings pending a decision by the Board on whether it would direct an election on the Union's

[1]The Archidiocese has voluntarily bargained with the union for the lay teachers employed in its secondary schools for some ten years. *Archdiocese of Philadelphia*, 227 NLRB 1178, 1180.

petition. (Pet. App. A2-A4). On January 17, 1977, the Board issued its decision, ordering that a representation election be held among all full-time lay teachers employed by the approximately 275 parish elementary schools within the Archdiocese. *Archdiocese of Philadelphia*, 227 NLRB 1178.

On January 25, 1977, petitioners moved to reactivate their request for injunctive relief. On February 17, 1977, the district court denied the Regional Director's motion to dismiss for lack of jurisdiction and granted a preliminary injunction preventing the Regional Director from conducting the scheduled election or taking any other action relating to petitioners' schools (Pet. App. A5). The Regional Director and the Union appealed from the preliminary injunction (C.A. 3, Nos. 77-1318 and 77-1328). On May 19, 1977, Mr. Justice Brennan granted a stay of the preliminary injunction to permit the Board to conduct the election and to impound the ballots pending final disposition of the appeals (Pet. App. A73-A74).[2] The representation election was conducted on June 14, 1977, and the ballots were, and remain, impounded (*id.* at A6).

On July 7, 1977, the district court permanently enjoined the Regional Director from asserting jurisdiction over the parish elementary schools in the Archdiocese of Philadelphia. At the outset, the court determined that it had jurisdiction to enjoin the Board's administrative proceedings, reasoning that the review provisions of Section 10(e) and (f) of the Act, 29 U.S.C. 160(e) and (f), which provide for court of appeals review of final orders of the Board, precluded district court review only of labor

[2]On May 31, 1977, the Court denied petitioners' motion to vacate the stay. 431 U.S. 935.

law issues, not of constitutional ones (Pet. App. A6-A12).[3] The district court then held that the Act was unconstitutional as applied to the parish schools, concluding that it would burden the free exercise of petitioners' religious beliefs and would lead to an impermissible government entanglement in religious affairs (*id.* at A29-A41).

The Regional Director and the Union appealed from the order granting a permanent injunction to the United States Court of Appeals for the Third Circuit. Petitioners seek review by this Court in advance of judgment by the court of appeals.[4]

ARGUMENT

Petitioners request this Court to take the extraordinary step of granting certiorari to review a district court decision in their favor in advance of judgment by the court of appeals. The premise for petitioners' request is that this case presents the same question that is pending before the Court in *National Labor Relations Board* v. *Catholic Bishop of Chicago*, No. 77-752, certiorari granted, February 21, 1978, *i.e.*, whether the National

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[3]The court acknowledged that *Grutka* v. *Barbour*, 549 F. 2d 5 (C.A. 7), certiorari denied, 431 U.S. 908, which held that the district court lacks jurisdiction to enjoin the Board's application of the Act to parochial elementary and secondary schools on First Amendment grounds, was "directly on point," but it concluded that that case "was incorrectly decided" (Pet. App. A8).

[4]On September 8, 1977, the court of appeals heard oral argument on the appeals from the district court's preliminary injunction. On November 25, 1977, the court ordered the appeals to be reheard *en banc* along with the appeals from the district court's final order. On February 22, 1978, the Third Circuit decided to postpone oral argument in both cases because of this Court's grant of certiorari in *National Labor Relations Board* v. *Catholic Bishop of Chicago*, No. 77-752 (Pet. App. A75-A76).

Labor Relations Act may constitutionally be applied to parochial schools. However, while the district court did determine that the application of the Act to petitioners' schools would violate the First Amendment, there is a substantial threshold question whether it had jurisdiction to make that determination. As we show below, it is likely that the court of appeals will conclude that the district court lacked jurisdiction and that this Court would decline to grant review of that decision. See *Grutka* v. *Barbour*, 549 F. 2d 5 (C.A. 7), certiorari denied, 431 U.S. 908. In these circumstances, petitioners cannot show that "the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court." Sup. Ct. R. 20.

1. Ordinarily district courts do not have jurisdiction to enjoin the Board from conducting representation or unfair labor practice proceedings, because judicial review of Board action may be had only in the court of appeals following issuance of a final order in an unfair labor practice proceeding. *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 476-479; *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48-49. Such review affords "an adequate opportunity to secure judicial protection against possible illegal action on the part of the Board." *Myers* v. *Bethlehem Shipbuilding Corp.*, *supra*, 303 U.S. at 48. "[U]ntil the Board's order has been affirmed by the appropriate * * * Court of Appeals, no penalty accrues for disobeying it," and "all questions of the jurisdiction of the Board and the regularity of its proceedings, all questions of *constitutional right or staturoty authority*, are open to examination by the court." *Id.* at 48-49; emphasis added.

The procedures leading to judicial review in the ordinary course do not themselves violate petitioners' rights, and thus there is no reason to permit injunctive

action in the district court. *Grutka* v. *Barbour, supra,* 549 F. 2d at 9-10. At most, petitioners might be subject in the interim to a Board order to bargain with the Union as the representative of the lay teachers in the Archdiocese's elementary schools. Such an order may never issue, however, and if it does not issue there will be no need to resolve the First Amendment question petitioners seek to present as to their schools.[5]

Even if the Board should issue a bargaining order, petitioners would not be obliged to comply until the order had been enforced by a court of appeals. Petitioners would have a full opportunity to present to that court their constitutional arguments why the order should not be enforced. The statutory procedure thus affords petitioners an adequate means to obtain judicial review of their contentions, in the context of a particular administrative order.[6]

2. *Leedom* v. *Kyne,* 358 U.S. 184, does not assist petitioners. *Kyne* held that district courts may entertain a challenge to Board action that is admittedly contrary to a specific mandatory prohibition in the Act where the absence of district court jurisdiction would result in " 'a

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[5]Since the representation election has already been conducted pursuant to the partial stay granted by Mr. Justice Brennan, the further administrative proceedings to which petitioners would be subject in the absence of an injunction would merely involve the counting of the ballots cast and the certification of results of the election. If the Union loses the election, it will have the option of filing objections that, if sustained, could necessitate the holding of a second election. However, no bargaining order can issue unless the Union is ultimately able to establish that it has the support of a majority of the unit employees.

[6]The statutory procedure was followed by the employers in *National Labor Relations Board* v. *Catholic Bishop of Chicago, supra,* and in *Cardinal Timothy Manning* v. *National Labor Relations Board,* pending on petition for review, C.A. 9, No. 77-1286.

sacrifice or obliteration of a right' " because "there is no other means * * * to protect and enforce that right." *Id.* at 190. See *Boire* v. *Greyhound Corp., supra,* 376 U.S. at 480. "Unlike *Kyne,* this case presents no patent disregard by the Board of the bounds of its statutory jurisdiction." *Grutka* v. *Barbour, supra,* 549 F. 2d at 8. Moreover, the absence of power in the district court does not preclude petitioners from litigating their constitutional claims; it means only that they must do so in the statutorily prescribed manner.[7]

3. The constitutional basis for petitioners' attack on the Board's authority does not justify bypassing the ordinary course of exhaustion of administrative remedies and review (if that should be necessary) in the court of appeals. As the Court stated in *Myers* v. *Bethlehem Shipbuilding Corp., supra,* 303 U.S. at 50-51, the exhaustion requirement applies to constitutional questions no less than to other types of questions.

It is particularly appropriate that the constitutional questions sought to be raised by petitioners be resolved after, rather than before, the Board proceedings have been completed. Only at the conclusion of those proceedings can "the nature and scope of the state entanglement attacked * * * be measured against a factual record delineating the character of entanglement which assertedly arises from the state intrusion." *Grutka* v. *Barbour, supra,*

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[7]In *McCulloch* v. *Sociedad Nacional,* 372 U.S. 10, district court intervention in the Board proceeding was justified only because actions taken by the Board "created international problems for our Government." *Id.* at 16-17. No such extraordinary circumstances are presented here. This Court stressed in *Sociedad Nacional* that the jurisdictional holding in that case was "not to be taken as an enlargement of the exception in *Kyne.*" 372 U.S. at 17. See *Boire* v. *Greyhound Corp., supra,* 376 U.S. at 480.

549 F. 2d at 8.[8] Furthermore, the fact that the Board's determinations of the statutory issues raised by petitioners, or the court of appeals' review of those determinations, may obviate the necessity of ever deciding the constitutional questions presented in this case "constitutes a strong reason for not allowing" anticipatory judicial intervention. *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U.S. 752, 772. See also *Rescue Army* v. *Municipal Court of Los Angeles*, 331 U.S. 549, 568.[9]

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[8]The district court record in this case is not an adequate substitute for a full administrative hearing. It reveals nothing about the impact of the Act upon petitioners' schools other than the subjective fears and speculations of several clergymen, none of whom are shown to have any familiarity with the functioning of the Board or the Act. Moreover, it provides no basis for resolving the statutory issues raised by petitioners, which (as noted above) may obviate the necessity for reaching the constitutional issues.

[9]Although petitioners did not raise their constitutional claims before the Board, they did argue, on statutory grounds, that the individual parish elementary schools should be deemed to be the sole employers of the lay teachers, that they therefore did not meet the Board's monetary jurisdictional standard, and that an employer-wide unit was inappropriate for bargaining. After consideration of extensive evidence, the Board concluded that the schools and the Archdiocese were joint employers whose combined revenues satisfied the discretionary standard and that an employer-wide unit was appropriate. *Archdiocese of Philadelphia, supra*, 227 NLRB at 1178-1181.

CONCLUSION

The petition for a writ of certiorari before judgment should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

RICHARD B. BADER,
CAROL A. DE DEO,
Attorneys,
National Labor Relations Board.

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